discrimination[12] or taxation of commerce as commerce is unconstitutional. But unless the tax does discriminate or is a tax on the commerce as such it is not to be assumed that the state has surrendered a sovereign power so essential to the life of a government. In spite of the language of the United States Supreme Court in some cases, it is submitted that a state tax on interstate commerce is constitutional if it does not fall within one of these two classes. In many cases where a tax on property in transit was assailed as a violation of the commerce clause the real question was whether the property had acquired a taxable *situs*.[13] When property is in a position to demand apparently permanent protection from a state it has acquired such a *situs*. The mere fact that a tax in return for that protection will indirectly affect interstate commerce should not render it unconstitutional. Property situated and used wholly within the state is admittedly not exempt because it is an instrument of interstate commerce.[14] In Pullman's Palace Car Co. *v.* Pennsylvania,[15] moreover, the United States Supreme Court expressly recognized that, a taxable *situs* having been acquired by a constant average of units remaining within a state, a state tax is not unconstitutional, although the units on which the tax was based were continually in interstate transit. Only a holding[16] that logs delayed in the course of an interstate transit for more than a year by low water are not taxable, is opposed to this theory; and to some extent the decision of the Supreme Court that sheep which took six weeks in transit across a state were not taxable.[17] But if the sheep had taken a much longer time, it is believed that the court could have upheld a state tax without departing from its former decisions. Such a result would be desirable practically and logically sound.

Discrimination Resulting in a Financial Benefit to the State. — It is well settled that the maximum rates established by the legislature for the transportation of passengers by a common carrier must be reasonable and compensatory[1] and must not result in a denial of the equal protection of the laws. No statute is constitutional therefore which discriminates against a class arbitrarily chosen.[2] And if the discrimination is in favor of a class arbitrarily chosen it would seem that thereby the equal protection of the laws is taken from all those not

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[12] Woodruff *v.* Parham, 8 Wall. (U. S.) 123.

[13] Usually property in transit does not acquire a taxable *situs*. Hays *v.* Pacific Mail Steamship Co., 17 How. (U. S.) 596; Conley *v.* Chedic, 7 Nev. 336.

[14] The Delaware R. Tax Case, 18 Wall. (U. S.) 206. See Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 206, 5 Sup. Ct. 826, 829.

[15] 141 U. S. 18, 11 Sup. Ct. 876. Mr. Justice Bradley, who wrote the opinion in Coe *v.* Errol, note 7, *supra*, dissented.

[16] Coe *v.* Errol, 62 N. H. 303. The holding on this point was not appealed to the United States Supreme Court, but was cited with approval by Mr. Justice Bradley. See Coe *v.* Errol, 116 U. S. 517, 525, 6 Sup. Ct. 475, 477.

[17] Kelley *v.* Rhoads, see note 3, *supra*. In this case the statute imposed the tax on sheep within the state "for the purpose of grazing."

[1] Chicago & Grand Trunk Ry. Co. *v.* Wellman, 143 U. S. 339, 12 Sup. Ct. 400.

[2] Gulf, C. & S. F. Ry. Co. *v.* Ellis, 165 U. S. 150, 159, 17 Sup. Ct. 255.

in the designated class.[3] A discrimination based on reasonable grounds is proper,[4] and the courts are very ready to find such reasonable grounds for classification. Thus there would be no illegal discrimination against the rest of the traveling public were lower rates provided for persons traveling in such bodies or at such times that the expense of transportation was made less.[5] In some cases a discrimination which would otherwise be illegal might be proper as an exercise of the police power. Whether this is considered as a distinct justification of the discrimination, or whether the classification is deemed reasonable because of the police power, the result is the same. The police power would seem to justify a discrimination, otherwise illegal, to the same extent that it authorizes a taking of property otherwise without due process of law. A statute providing lower rates for school children, thereby putting the railroad to expense, would seem to be, *primâ facie*, both a discrimination against the rest of the traveling public and a deprivation of property of the railroad without due process of law; but such a statute was considered a proper exercise of the police power because a real stimulus was thereby given to education. More children attended school when there was cheaper transportation.[6] Similarly a discrimination resulting in a benefit to the public health,[7] or one which aided the state in its function of protection and maintenance of the peace, would seem to be proper.

The interesting question is raised in a recent case whether a discrimination resulting merely in a financial benefit to the state is justified. A statute provided that members of the state militia while traveling under orders should be carried at less than the regular maximum passenger fare, at a rate which did not deprive the railroad of property without due process of law. The court found that there was no illegal discrimination between the ordinary passenger and the militia. *State* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 137 N. W. 2 (Minn.). It is hard to find any reasonable distinction as to expense of transportation between the militia and other travelers, except possibly in the fact that the former often travel in large bodies. But the statute is not limited to the militia while so traveling. Considered as an exercise of the police power it is difficult to see how the transportation of the militia is thereby facilitated or the state aided in its function of protection and maintenance of the peace.[8] In a recent case a statute providing that policemen should be carried free on trolley cars was held constitutional as a proper exercise of the police power because the presence of the police might be necessary at any time to preserve the peace or enforce ordinances on the cars. *State* v. *Sutton*, 84 Atl. 1057 (N. J.). Even these considerations are not present in the case of the militia, and there seems to be no public benefit from providing a reduced fare for them except that the public treasury

[3] State *v.* Chicago, Milwaukee & St. Paul Ry. Co., 137 N. W. 2 (Minn.). See Conolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 557, 22 Sup. Ct. 431, 438.

[4] Opinion of the Justices, 166 Mass. 589; Pacific Express Co. *v.* Seibert, 142 U. S. 339, 12 Sup. Ct. 250.

[5] See Commonwealth *v.* Interstate Consolidated Ry. Co., 187 Mass. 436, 73 N. E. 530.

[6] Commonwealth *v.* Interstate Consolidated Ry. Co., *supra*; and see same case upon appeal, 207 U. S. 79, 85, 28 Sup. Ct. 26.

[7] See Jacobson *v.* Massachusetts, 197 U. S. 11, 25 Sup. Ct. 358.

[8] *Ex parte* Gardner, 84 Kan. 264, 113 Pac. 1054.

and the taxpayer are relieved of part of the burden of the expense of their maintenance.

It has been held that the deprivation of property resulting from a statute requiring policemen to be carried free is not constitutional where there is only a financial benefit to the state.[9] The providing of funds to carry on the functions of the state has never been considered an exercise of the police power. Nor would that power seem to include a lessening of the expense of government. Apart from the police power this action of the state can only be considered as the exercise of a power whose object is the same as that of taxation. But taxation must be uniform. It is difficult to see how the same purpose, to accomplish which a direct discrimination is not permitted, can supply any proper justification for a discriminatory regulation of rates. A different conclusion might be reached if the party discriminated against had a peculiar responsibility in aiding the state in carrying on the function the expense of which is lessened by the classification.[10] But in the Minnesota case the traveling public had no such responsibility.[11]

INSURANCE AS A FRAUDULENT CONVEYANCE OR PREFERENCE. — It is properly said that "there is no mystery or charm about life insurance." [1] But this proposition is not apparent in all the decisions which treat the question when insurance effected by a failing debtor in favor of a creditor or volunteer is voidable by his general creditors. The question has arisen most often where an insolvent attempts to provide for a wife, children, or other dependents by setting aside a portion of his income in the payment of premiums. In most states the matter is regulated by statute,[2] but in others a diversity of results is reached. The assignment of a policy to a volunteer is almost uniformly held fraudulent as to creditors.[3] It is a

[9] Wilson *v.* United Traction Co., 72 N. Y. App. Div. 233, 76 N. Y. Supp. 203. It is submitted that the case cited by the Minnesota court in support of the contrary of this proposition should not be construed as so holding. See Willcox *v.* Consolidated Gas Co., 212 U. S. 19, 29 Sup. Ct. 192.

[10] Such a situation arises when a railroad is required to pay part of the expenses of a state railroad commission. Charlotte, etc. Ry. Co. *v.* Gibbes, 142 U. S. 386, 12 Sup. Ct. 255.

[11] The established rule allows none to question the constitutionality of a statute because of discrimination, except one whose constitutional rights are thereby infringed. Brown *v.* Ohio Valley Ry. Co., 79 Fed. 176; Kansas City *v.* Union Pacific R. Co., 59 Kan. 427, 53 Pac. 468. Therefore the decision of the Minnesota court seems to be correct, since the objection is raised by the railroad against which there has been no discrimination.

[1] See Merchants' and Miners' Transportation Co. *v.* Borland, 53 N. J. Eq. 282, 285, 31 Atl. 272, 273.

[2] Twenty-eight states now have statutes of varying degrees of leniency to the beneficiary. Under statutes like that in Massachusetts, creditors may recover out of the proceeds of the policy the amount of the premiums, with interest, paid by the debtor with fraudulent intent. MASS., REV. LAWS, 1902, c. 118, § 73. Most lenient to the beneficiary is Tennessee, where all insurance on the husband's life enures to the benefit of his widow and children, free from the claims of his creditors. Both premiums and the face value of the policy may be unlimited in amount. TENN., CODE, 1896, § 4231.

[3] Taylor *v.* Coenen, 1 Ch. D. 636; Bailey *v.* Wood, 202 Mass. 562, 89 N. E. 149. *Contra*, Succession of Hearing, 26 La. Ann. 326, decided, however, in a civil-law jurisdiction, where the statute of Elizabeth is not in force.